

**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

WELLS FARGO BANK, N.A.,

2:08-CV-1448 JCM (RJJ)

Plaintiff,

v.

LaSALLE BANK NATIONAL
ASSOCIATION,

Defendant.

ORDER

Presently before the court is defendant LaSalle Bank National Association's motion to exclude testimony of plaintiff's purported experts. (Doc. #109). Plaintiff Wells Fargo, N.A. filed an opposition. (Doc. #125). Defendant filed a reply. (Doc. #141).

In the plaintiff's complaint, it asserts that LaSalle should be required to repurchase fourteen multifamily loans which LaSalle originated and securitized. Plaintiff asserts that LaSalle made a number of expressed representations and warranties with respect to the loans for the benefit of plaintiff and the certificateholders. Further, Wells Fargo asserts that the defendant breached representations 23 and 35 with respect to the loans, and that said breaches require LaSalle to repurchase the loans. To support this position, plaintiff offers the testimony of several expert witnesses.

In the present motion to exclude the testimony of plaintiff's experts (doc. #109), defendant asserts that under Federal Rule of Evidence 702 and applicable case law, the opinions and testimony of plaintiff's expert witness Thomas Watson, and certain opinions of plaintiff's expert witnesses

1 Daniel Smith and Tio Difederico, should be excluded. Specifically, defendant asserts that Mr.
 2 Watson's testimony purports to improperly opine on the legal interpretation of the Financial
 3 Institutions Reform, Recovery and Enforcement Act of 1989 ("FIRREA"), and that the testimony
 4 of the other witnesses merely "bootstrap" the improper and inadmissible testimony.

5 Pursuant to Federal Rule of Evidence 702, "[i]f scientific, technical, or other specialized
 6 knowledge will assist the trier of fact to understand the evidence or to determine a fact at issue, a
 7 witness qualified as an expert by knowledge, skill, experience, training, or education, may testify in
 8 the form of an opinion or otherwise..." Further, the expert may only testify if "(1) the testimony is
 9 based upon sufficient facts or data, (2) the testimony is the product of reliable principles and
 10 methods, and (3) the witness has applied the principles and methods reliably to the facts of the case."
 11 Federal Rule of Evidence 702.

12 **Expert Witness Thomas Watson**

13 Defendant asserts that plaintiff deposed Mr. Watson as a fact witness and also purposes to
 14 designate him as an expert witness. The court recognizes that this is permissible, but also recognizes
 15 that the court must scrutinize the proposed expert component of the testimony to ensure it is
 16 admissible. *Nationwide Transp. Fin. v. Cass Info. Sys., Inc.*, 523 F.3d 1051, 1058-60 (9th Cir. 2008).
 17 When there is a witness serving this dual role, any testimony given in the expert capacity must satisfy
 18 both rule 702 and the relevant case law to avoid being excluded. *Id* at 1058-60.

19 **1. Mr. Watson's Legal Opinions or Conclusions**

20 Defendant asserts that an expert opinion which purports to explain or define the meaning of
 21 legal standards, or offer legal opinions or conclusions, is inadmissible. *Id* at 1059. LaSalle further
 22 asserts that opinions from an expert that explain or apply a statute to the facts in the case must be
 23 excluded because such opinions "would, in effect, instruct the jury regarding how it should decide
 24 the key question" at issue. *Id* at 1059.

25 Here, defendants ask this court to exclude Mr. Watson's expert testimony because he is
 26 "offering a legal opinion, namely an opinion on the meaning of FIRREA, and its relevant regulations,
 27 and whether MFG's appraisal ordering practices comply with the law." In this assertion, defendant
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LaSalle relies on plaintiff's expert disclosures that state that Mr. Watson has been deposed and has testified "concerning the regulatory requirements for appraisals...and whether LaSalle complied with regulatory requirements for the MFG appraisals, including but not limited to FIRREA."

Plaintiff states that Mr. Watson was previously employed by LaSalle as an independent consultant to provide opinions and advice on LaSalle's lending programs, and that in this capacity he identified any FIRREA violations and recommended what corrective actions to take. Plaintiff argues that, unlike in *Nationwide*, the legal issues raised by Mr. Watson are done in such a manner that they become "an operative fact to be proven within the case rather than a rule of decision for deciding the case." Further, plaintiff asserts that his testimony relates to a "discrete point of law, i.e., the requirements of FIRREA, which would be helpful to the jury's ultimate determination of whether [r]ep[resentation] 35 was breached."

As Mr. Watson's testimony purports to interpret FIRREA and opine as to whether it was violated, this testimony is a "legal conclusion" and is inappropriate for an expert to testify to. *Nationwide Transp. Fin. v. Cass Info. Sys., Inc.*, 523 F.3d 1051, 1059 (9th Cir. 2008). Further, if in fact it is found that defendant did not comply with the FIRREA regulations as it was required to do under representation 35, the plaintiff will prevail on this issue. Therefore, an opinion that it *failed* to comply with the regulations would relate to the ultimate *legal issue* in the case, and not be merely an operative fact. Thus, as Mr. Watson's testimony is a legal opinion and/or conclusion regarding the ultimate legal issue, it should be excluded because it would "in effect, instruct the jury regarding how it should decide the key question" at issue. *Id* at 1059.

2. Reliability of Mr. Watson's Testimony

LaSalle asserts that expert witness Mr. Watson's testimony is unreliable because it suffers from "fundamental analytical gaps." Specifically, defendant asserts that he has no basis in the statute or regulations for his opinions, and that "while stating the opinion that LaSalle's process "violated" FIRREA, Mr. Watson also stated that *nothing in the statute or regulations addresses the issue of who within a financial institution can or should order the appraisals.*" (Emphasis supplied). Defendant asserts that this unreliable testimony is inadmissible under Federal Rule of Evidence 702,

1 as it is not the “product of reliable principles and methods.”

2 As the court has held above that expert witness Mr. Watson’s testimony must be excluded
3 with regards to the legal issue of the case, i.e. whether FIRREA was violated, the court need not
4 address whether his opinion on that issue suffered from “fundamental analytical gaps.”

5 **Expert Testimony of Daniel Smith and Tio DiFederico**

6 Defendant asserts in the motion to exclude (doc. #109) that the testimony of plaintiff’s expert
7 witnesses Daniel Smith and Tio DiFederico should be excluded with regards to the manner in which
8 MFG group ordered appraisals because they merely “bootstrap” their opinions onto those of Mr.
9 Watson.

10 Pursuant to Federal Rule of Evidence 703, “[f]acts or data that are otherwise inadmissible
11 shall not be disclosed to the jury by the proponent of the opinion or inference unless the court
12 determines that their probative value in assisting the jury to evaluate the expert’s opinion
13 substantially outweighs their prejudicial effect.” Further, a court may exclude testimony of an expert
14 when it is “inextricably linked” to, or a “derivative of,” the inadmissible excluded testimony of
15 another expert. *See J.B. Hunt Transp., Inc., v. GM Corp.*, 243 F.3d 441, 444 (8th Cir. 2001).

16 **1. Mr. Smith’s Testimony**

17 Defendant asserts that Mr. Smith’s expert report merely “recites Mr. Watson’s legal opinions
18 as the basis for his conclusion that MFG’s appraisal ordering violated FIRREA and failed to meet
19 customary industry standards.” Specifically, Mr. Smith’s report stated that “[o]ne of Mr. Watson’s
20 conclusions...was that the manner in which MFG ordered its appraisals was not FIRREA
21 compliant...It is my opinion that *since* LaSalle’s appraisal ordering process was not FIRREA-
22 compliant... the ordering process did not satisfy customary industry standards for loan origination.”
23 (Doc. #109-8). (emphasis added).

24 Further, defendant asks this court to exclude Mr. Smith’s testimony because he lacks
25 specialized knowledge and expertise concerning FIRREA. In his deposition (doc. #109-12 and #109-
26 13), Mr. Smith admits that he relied on the opinions and conclusions of others, and answered
27 “correct” when asked if he was “relying upon others who have opined that the manner in which
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1 appraisals were ordered...was not FIRREA compliant,” and if he was “relying on opinions of others
2 as opposed to you reaching that opinion yourself.”

3 As Mr. Smith is simply basing his opinion upon the already inadmissible testimony of Mr.
4 Watson, and any probative value is outweighed by the prejudicial effect, his “derivative” testimony
5 with regards to this issue is excluded. *Id*; Federal Rule of Evidence 703. Moreover, as he admittedly
6 has no independent basis for his conclusions, his testimony does not comport with the requirements
7 in rule 702, and his testimony regarding this issue is excluded. Federal Rule of Evidence 702.

8 **2. Mr. DiFederico’s Testimony**

9 **a. Lacks Independent Basis and Required Expertise**

10 Defendant asserts that Mr. DiFederico also relies on Mr. Watson’s legal conclusions in his
11 report, when he stated “[i]t is clear after reading his deposition that Mr. Watson was of the opinion
12 that...they were in violation of FIRREA...*After* reading Mr. Watson’s deposition and the exhibits...
13 I would agree with Mr. Watson that LaSalle appraisal ordering procedures violated the intent of
14 FIRREA’s appraiser independence.” (Doc. #109-9). (emphasis added).

15 Defendants acknowledge that Mr. DiFederico is knowledgeable regarding the standards
16 applicable to conducting appraisals. However, the additional issue defendants have with Mr.
17 DiFederico’s opinion is that he “admitted that he does *not* have specialized knowledge or expertise
18 regarding the industry standards *within banks* for ordering appraisals or whether the regulations
19 relate to that issue.” (emphasis supplied).

20 Just as with Mr. Smith, the court is inclined to exclude Mr. DeFederico’s opinion regarding
21 the appraisal ordering compliance with FIRREA, because he derives his opinion from inadmissible
22 testimony of Mr. Watson, and admits that he lacks specialized knowledge required under Federal
23 Rule of Evidence 702.

24 **b. Untimely Opinion**

25 Defendant also asserts that Mr. DiFederico’s testimony should be excluded because it was
26 untimely under Federal Rule of Civil Procedure 26(a)(2)(B). Under this rule, a party’s expert
27 disclosure must contain “a complete statement of all opinions the witness will express and the basis
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1 and reasons for them.” Fed. R. Civ. P. 26(a)(2)(B)(I). Defendant asserts that Mr. DeFederico’s
2 opinion with regards to the appraisal ordering did not appear in his initial disclosure, and was
3 introduced for the first time in rebuttal expert disclosures.

4 As this court has determined that Mr. DiFederico’s opinion with regards to the appraisal
5 ordering is excluded, it need not determine whether the opinion is also excluded on other grounds.

6 Accordingly,

7 IT IS HEREBY ORDERED ADJUDGED AND DECREED that defendant LaSalle Bank
8 National Association’s motion to exclude testimony of plaintiff’s purported experts (doc. #109) be,
9 and the same hereby is, GRANTED.

10 DATED February 9, 2011.

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13 **UNITED STATES DISTRICT JUDGE**